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The Degree of Danger and the Degree of Difficulty of Removal of the Danger as Factors in Attractive Nuisance Cases

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THE DEGREE OF DANGER AND THE DEGREE OF DIFFICULTY OF REMOVAL OF THE DANGER AS FACTORS IN "ATTRACTIVE NUISANCE" CASES[1]

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IN the so-called attractive nuisance cases, there loom much larger in importance than usually supposed, two questions first, "Was the degree of danger to children very great?" and second, "Would it have been reasonably practicable and not too difficult for the defendant to remove the danger?" "Attractive nuisance" cases being cases of negligence and not of nuisance, such matters as these, affecting the problem of duty of care, seem very properly to influence the courts' disposition of such litigation. In judicial discussions, comparatively little of open and avowed attention has been accorded these two questions,[2] but the courts of a few states have frankly considered them in one form or another.[3]

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[1]SCOPE NOTE.—Inasmuch as they involve, in the main, the same general principles as the cases of children trespassing upon land, cases of children suffering bodily harm while committing trespass to personalty are treated. Among such cases are those of children playing upon vehicles standing or moving or upon machinery standing in the street.

Because the high degree of danger and the practicability and even complete ease of removing the danger should be obvious to all in the "turntable cases," such cases are mentioned only incidentally.

[2]These matters are given attention, however, in the Restatement of the Law of Torts, of the American Law Institute, Tentative Draft No. 4, Sec. 209 (d), p. 153, which makes it a condition of "liability for artificial conditions highly dangerous to trespassing children" that "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

"The two considerations, that the beneficial use of land is a necessity, and that such use cannot easily be restricted without very substantial damage (if not total deprivation) to the owner, have had great weight with the courts, so far as the case of adult intruders is concerned." Jeremiah Smith, article, "Landowners' Liability to Children," (1898) 11 Harv. L. Rev. 349, 363.

[3]In Chicago, B. & Q. R. Co. v. Krayenbuhl, (1902) 65 Neb. 889, 91 N. W 880, 59 L. R. A. 920, a turntable case, Albert, C., said. "A turntable is a dangerous contrivance, which facilitates railroading; the general benefits resulting from its use outweigh the occasional injuries inflicted by it; hence the public good demands its use. We may conceive of means by which it might be rendered absolutely safe, but such means would so interfere with its beneficial use that the danger to be anticipated would not justify their adoption, therefore the public good demands its use without them. But the danger incident to its use may be lessened by the use of a lock which would prevent children, attracted to it, from moving it; the

Indirectly and tacitly, it seems that courts permit themselves to be influenced by the answers, frequently obvious, to these two queries.

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interference with the proper use of the turntable occasioned by the use of such lock is so slight that it is outweighed by the danger to be anticipated from an omission to use it; therefore the public good, we think, demands the use of the lock. The public good would not require the owner of a vacant lot on which there is a pond to fill up the pond or inclose the lot with an impassable wall to insure the safety of children resorting to it, because the burden of doing so is out of proportion to the danger from leaving it undone. But where there is an open well on a vacant lot, which is frequented by children, of which the owner of the lot has knowledge, he is liable for injuries sustained by children falling into the well, because the danger to be anticipated from the open well, under the circumstances, outweighs the slight expense or inconvenience that would be entailed in making it safe.

"Hence, in all cases of this kind in the determination of the question of negligence, regard must be had to the character and location of the premises, the purpose for which they are used, the probability of injury therefrom, the precautions necessary to prevent such injury, and the relations such precautions bear to the beneficial use of the premises."

In Morse v. Douglas, (1930) 107 Cal. App. 196, 290 Pac. 465, 467, the court said. "The contrivance must be artificial and uncommon, as well as dangerous, and capable of being rendered safe with ease without destroying its usefulness, and of such a nature as to virtually constitute a trap into which children would be led on account of their ignorance and inexperience." This is quoted with approval in Beeson v. Los Angeles, (1931) 115 Cal. App. 122, 300 Pac. 993.

Clark v. Pacific Gas & Electric Co., (1931) 118 Cal. App. 344. 5 P (2d) 58 states the rule that, to make the attractive nuisance doctrine applicable, the thing must be dangerous and easily guarded and rendered safe.

Plaintiff's intestate, a boy ten years old, while playing, fell into the city's storm drain, 20 feet deep and 20 feet wide, along the side of a street, and was drowned. The court affirmed a judgment for defendant city, quoting Morse v. Douglas, supra. The drain was only an emergency storm drain. It is obvious that the expense of removing the danger would have been out of proportion to the occasional danger. Beeson v. Los Angeles, (1931) 115 Cal. App. 122, 300 Pac. 993.

In Hernandez v. Santiago Orange Growers' Ass'n, (1930) 110 Cal. App. 229, 293 Pac. 875, plaintiff's decedent, a boy nearly ten years old, was killed by the fall of a 300-pound block of ice upon him, while defendant was unloading ice. Besides giving other reasons for affirming judgment for the defendant, the court said. "Nor can it be said that these loading operations were capable of being rendered safe with ease without destroying their usefulness."

In refusing to treat a pond as an attractive nuisance, in Peters v. Bowman, (1896) 115 Cal. 345, 355, 356, 47 Pac. 113, 598, 599, 56 Am. St. Rep. 106, 113 the court said. "A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be made inaccessible to boys by any ordinary means. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common or artificial and uncommon, or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions." See also Polk v. Laurel Hill Cemetery Ass'n, (1918) 37 Cal. App. 624, 174 Pac. 414.

"The 'turntable cases' rest in part upon the proposition that the danger

This seems to be true to so great an extent that there is good reason to say that within the scope of these two questions lies an important part of the solution of a great many, if not of all, of the "attractive nuisance" cases. Probably both the degree of danger and the difficulty of its removal are potential factors in all cases of "attractive nuisance." On this point, as on many others subjected to the judicial process, silence thereon does not necessarily mean exclusion from the operation of the mental processes of the judge.

The first question, that of the greatness of the degree of danger to children, naturally resolves itself into two parts (a) "Is there an unreasonable risk of some harm to children?" and (b) "Is the harm of which the risk is taken a very great harm?" In some of the cases, the risk of some injury to children is so slight as not properly to be taken into account as a basis of any duty of special care toward children at all, but, in other cases, the likelihood of some injury to children is so great that failure to exercise special care toward children may properly be treated as negligence, provided the danger is of serious enough damage to the person, and provided also, it seems, that the exercise of such special care is reasonably practicable. In many instances, even where it is clear that there is danger of some injury to children, the danger is not of serious injury, and naturally courts feel impelled to exercise considerable caution in laying down any rule that might impede the operation of industry by compelling the exercise of great care in order to avoid danger of more or less petty accidents.

There have occurred many instances of rather unusual and unexpected injuries to children, injuries of a type that had seemed

created by the act of the owner could be easily removed by the simple device of locking or fastening the dangerous machinery, and that, while the owner of such machinery is not held to the exercise of great care in protecting it against the trespasses of children, it is required to exercise ordinary care to that end." Cahill v. E. B. & A. L. Stone & Co., (1908) 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N.S.) 1094.

"The correct rule of law is, and should be, that if a railroad company can with slight expense and little inconvenience keep its turntables guarded or locked so as to prevent trespassing children from using them, they should be compelled to do so, and, if they fail to perform this duty, they should be made liable in damages for any injury occasioned to children of tender years in playing with them." Brown v. Chesapeake & O. Ry. Co., (1909) 135 Ky. 798, 123 S. W 298, 25 L. R. A. (N.S.) 717

In a recent case, May v. Simmons, (1932) 104 Fla. 707, 140 So. 780, 781, the supreme court of Florida said "This count suggests a particular method of stopping the conveyor [in which a child was injured]—a method which obviously would be impracticable. The demurrer was therefore sustained to the seventh count."

so unlikely to occur that reasonable persons would not believe that it would be necessary to guard against them. The failure to guard against such consequences cannot properly be said to be negligence. In such instances, as might be expected, courts do not usually hold the defendant liable for injuries to a child.[4] Even in the cases of explosives, a slight chance of great harm seemingly cannot be made the basis of a duty of defendant to exercise special care for the safety of children.[5] That boys shall exercise great mechanical ingenuity in bringing themselves or others into danger

[4]The lack of probability that a girl four years old would walk into the right of way of a railroad company and be burned by a fire thereon, under the circumstances of the case was probably regarded by the court as so clear as to constitute one of the impelling reasons for not holding the railroad company liable for her fatal burning, although nothing is said in the opinion about this phase of the case, which arose from an occurrence in a small village and not in a place of thick population, where the chance that some child might be injured would have been greater. Erickson v. Great Northern Railway Co., (1900) 82 Minn. 60, 84 N. W 462, 51 L. R. A. 645, 83 Am. St. Rep. 410. Contrast the facts and the appropriate holding in Roman v. City of Leavenworth, (1913) 90 Kan. 379, 133 Pac. 551, in which plaintiff, a boy 11 years old, had been injured while playing on a city dump, by falling into a smouldering fire, defendant having known that plaintiff had, for some weeks, been playing in the dump, and having used no reasonable precaution to keep him away. That plaintiff was in danger, defendant knew.

In Fitzpatrick v. Rose Donahue Realty Co., (1922) 151 Minn. 128, 186 N. W 141 defendant, an apartment house owner, did not remove a barrel of slaked lime, covered with boards, left by a contractor in the rear yard of the premises. Plaintiff, a girl eight years old, played in the yard with children residing in the building. She was not a trespasser. Another child threw some of the lime into plaintiff's eye, impairing the sight. Held, that defendant was not liable. The court said. "There was so little cause in common experience to apprehend a casualty of the kind that happened in this case that in our opinion defendant was not under duty to cause the removal of the material."

Obviously, one is not bound to anticipate and guard against so unusual and improbable events as those occurring in Nichol v. Bell Telephone Co. of Pa., (1920) 266 Pa. St. 463, 109 Atl. 649.

[5]Probably in most of the cases involving explosives, not only is there a chance of serious bodily harm, but there is a great chance of such harm. But this is not always true. In such a case as St. Louis & S. F R. Co. v. Williams, (1911) 98 Ark. 72, 135 S. W 804, 33 L. R. A. (N.S.) 94, wherein plaintiff, an 11-year-old boy, went upon the right of way of defendant and exploded one of its torpedoes, probably with considerable effort, plaintiff's course of action and consequent damage to his person were hardly to be contemplated as natural and probable results of the placing of torpedoes by defendant on its right of way, though the court stresses rather the impracticability of removing such a danger. In St. Louis, I. M. & S. Ry. Co. v. Waggoner, (1914) 112 Ark. 593, 166 S. W 948, 52 L. R. A. (N.S.) 181, plaintiff, a boy ten years old, dropped a lighted match into an empty alcohol barrel on defendant's railway platform. In holding that defendant was not liable for the consequent injury to plaintiff, the supreme court said that defendant was not under a duty to anticipate such a result. The chance of such an occurrence would probably seem to any reasonable person to be very slight.

is not a hazard to be anticipated and guarded against by the possessor of property [6] Machinery in a building on defendant's land

[6]Barnhill's Adm'r v. Mt. Morgan Coal Co., (D.C. Ky. 1916) 215 Fed. 608. Defendant had coal cars weighing 1,000 pounds each on a side track. In order to keep boys from running cars down an incline in the tracks, defendant had derailed a car to obstruct the other cars. Boys from fifteen to seventeen years old re-railed the car and pushed the empty cars down the incline, running over and killing plaintiff's intestate, a child ten years old. It was held that defendant was not liable under the doctrine of the turntable cases.

In Kressine v. Janesville Traction Co., (1921) 175 Wis. 192, 184 N. W 777 defendant, a street car company, tied down the trolley pole to the top of its car left standing in the street, turned the switch at both ends of the car, set the brakes, removed the controller, and locked the doors. Plaintiff, a boy about three years old, was injured when other boys, who had entered the car, managed to start and run it. Judgment for plaintiff was reversed and the cause remanded, with directions to dismiss the complaint. The court said. "That the probability of childish interference with the car was appreciated, and a bona fide effort made to render it innocuous to probable childish incursions, is manifest. * * * The care required under such circumstances is reasonable care. It is the care that men of ordinary prudence would exercise under the same or similar circumstances. The dangers which it was the duty of the company to guard against were such as reasonably might have been anticipated. It was not an insurer of the safety of the children. It was not the duty of the company, as we view it, to so dismantle or disempower the car as to render it harmless under every conceivable circumstance. It was charged with knowledge of ordinary childish conduct, and it was bound to anticipate consequences resulting from such conduct. It was not bound to anticipate consequences resulting from the unusual or extraordinary conduct or the precocious ingenuity displayed by the particular crowd of boys."

On the other hand, there is considerable likelihood that children will move small push-cars running on rails. In Morrison v. Phelps Stone Co., (1920) 203 Mo. App. 142, 219 S. W 393, defendant maintained small push-cars running on iron rails and used for conveyance of rock from one part of its quarry to another. These cars attracted children to play thereon. Plaintiffs' intestate, a boy ten years old, was fatally injured while so playing. The trial court gave judgment for defendant on demurrer to the petition, and plaintiffs appealed. The court of appeals reversed and remanded the case, treating the cars as an attractive nuisance, although admitting that the doctrine would not apply to ordinary railroad cars. The wisdom of this disposition of the case would probably be doubted by many. If the decision is justified, it would seem to be on the grounds (1) that the attraction of small cars to children was very great, and (2) that the small cars were easily movable by children, thus creating an unreasonable risk that children would enter and play with them and be injured. As contrasted with this case of small cars, the supreme court of the same state had treated a standard gauge railroad flat car, unbraked and unlocked, and requiring from six to eight boys from nine to thirteen years old to move it, as not an attractive nuisance. Buddy v. Union Terminal R. Co., (1918) 276 Mo. 276, 207 S. W 821. Clearly, the danger that a standard gauge flat car will be moved by children is remote, on account of great size and weight.

Much greater than the hazard in Morrison v. Phelps Stone Co., supra, was that in Cahill v. Stone & Co., (1908) 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N.S.) 1094, for the push-car involved in the Cahill case was on a railroad track in a street in a populous residence district, and the reversal of judgment for defendants was only to be expected.

usually is reasonably safe from the intrusions of children and is therefore unlikely to cause them any harm, for which reason we may feel that it is natural to find, as we do, that courts seem reluctant to call machinery in defendant's building an attractive nuisance;[7] but circumstances may be such as to make it incumbent upon the occupant, as a reasonable man, to foresee and guard against injuries to children, even by machinery within a building on his premises.[8] It is, of course, well known that a large portion of the cases of so-called attractive nuisance, in which the owner of a mechanical device has been held liable for injuries inflicted upon children, are cases in which the mechanism was out of doors, as seems to have been true in the turntable cases. This is natural, as the attraction and access of children to the machinery are rendered more likely and easier by the absence of such hiding and

[7]In Nelson v. Lake Mills Canning Co., (1922) 193 Iowa 1346, 188 N. W 990, plaintiff's intestate, a boy of six, was fatally injured by machinery of defendant, to which he had crawled through an opening under a dump floor. The boy's access to the machinery being a contingency in no way to be expected by a reasonable man, it could not properly be said that defendant was guilty of negligence in failing to foresee and guard against the boy's consequent injury. See also Pennington v. Little Pirate Oil & Gas Co., (1920) 106 Kan. 569, 189 Pac. 137

In Houck v. Chicago & Alton Ry. Co., (1906) 116 Mo. App. 559, 92 S. W 738, defendant had pumping machinery remote from any dwelling house and within a building where posted notices and personal warnings were given to keep trespassers out. Plaintiff, a boy nine or ten years old, testified that he did not approach the machine on account of curiosity or interest in it, but because the engineer requested his help in starting the machinery, and admitted that he had been warned to stay out. Judgment for plaintiff was reversed, the court holding that this is not an attractive nuisance case, but laying a foundation for a possible judgment for plaintiff on a second trial on another theory.

[8]In Herrem v. Konz, (1917) 165 Wis. 574, 162 N. W 654, plaintiff, a boy nine years old, while playing under the lumber mill of defendant, was injured by a revolving shaft. The supreme court said. "The question is. Did the court err in holding that the complaint does not state a cause of action for ordinary negligence? The allegations of the complaint charge that the defendant knew that children of tender age living in the immediate vicinity of his lumber mill were in the habit of playing in the open spaces underneath the ground floor of the mill in close proximity to a rapidly revolving shaft, which under the alleged facts and circumstances was inherently dangerous to children of tender age. These allegations must be liberally construed in passing on the issues presented by the demurrer. We cannot anticipate whether or not the evidence upon a trial of the case will sustain the complaint in all its intendments. But the pleading on its face alleges sufficient facts to charge the defendant with negligence towards the plaintiff as a boy of tender years in that it charges that he played upon the premises of the defendant with the permission of the defendant and that the rapidly revolving shaft in the alleged location and unprotected condition was inherently dangerous to children of tender years. Under these circumstances the defendant was bound to anticipate that an injury might result to some child by coming in contact therewith."

protection as a building affords. But the fact that the machinery is out of doors cannot conclude the case in favor of plaintiff, for the question of foreseeability of damage to the persons of children may be determined by other factors, and such factors may settle the issue in favor of defendant, or they may raise, as they often do, a close and doubtful question of liability.[9] Where machinery dangerous to children is left in a street, the chance that playing children will suffer bodily harm therefrom is likely to be very great, and defendants having left such machinery in the street have often been held liable for damage to the persons of children attracted thereto.[10] An element increasing the chance that machinery may cause bodily harm to children is its presence in a thickly settled neighborhood, in which there are likely to be many children.[11] Likewise, proximity to a school[12] or to a play-

[9]See Ryan v. Tower, (1901) 128 Mich. 463, 87 N. W 644, 55 L. R. A. 310, 92 Am. St. Rep. 481.

[10]In Kelley v. Parker-Washington Co., (1904) 107 Mo. App. 490, 81 S. W 631, defendant left a scraper in the street. Plaintiff, a girl six years old, climbed into the scraper and sat in the pan. Her brother, a little younger, ran and jumped upon the front platform of the scraper, causing the pan to drop, producing serious injury to plaintiff's left hand. Judgment for plaintiff was affirmed. Defendant was held negligent in not securing the lever so that the pan could not fall and in that it did not guard the scraper in any way so that children might not be injured thereon. It seems that the chance of injury was very great and should have been foreseen and guarded against.

See also Haynes v. City of Seattle, (1912) 69 Wash. 419, 125 Pac. 147, Ashbach v. Iowa Telephone Co., (1914) 165 Iowa, 473, 146 N. W 441, Kelly v. Southern Wisconsin Ry. Co., (1913) 152 Wis. 328, 140 N. W 60, 44 L. R. A. (N.S.) 487

[11]Defendant, a street railway company, was held liable for the death of a child caught in an unguarded coal conveyor on defendant's unfenced premises in a densely populated neighborhood, in Stollery v. Cicero & P. St. Ry. Co., (1910) 243 Ill. 290, 90 N. E. 709. See also Kopplekom v. Colorado Cement-Pipe Co., (1901) 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284.

[12]In Ashbach v. Iowa Telephone Co., (1914) 165 Iowa 473, 146 N. W 441, defendant's servants were at work, stringing telephone cables in a street within a block of a public school, which large numbers of small children, including plaintiff, a seven-year-old boy, attended. Defendant used a pulley and rope pulled by a team. Defendant knew that children were attracted to the pulley and warned them away. Plaintiff grasped the rope and was jerked into the pulley by the horses and injured. Judgment for plaintiff was affirmed. The court said. "While defendant had the right to use the street and the appliances that it did, it was bound in law to the exercise of ordinary and usual care in the handling thereof, and what amounts to such care is generally a jury question. What it might do in the country and along public highways does not necessarily give it license to do the same at or near a schoolhouse, where children are likely to be passing in numbers at certain hours of the day. It might, as we understand it, have attached the snatch block so high that children could not have reached it. It might, during the time children were due to pass, have stationed guards to keep them away from the dangerous pulley. It might also have erected a

ground[13] may greatly increase such chance. Generally speaking, if defendant occupant knew or should have known that children frequented the place where the dangerous device was located, it has proved easier for plaintiff to establish a duty of special care on the part of the defendant.[14] Very properly, in cases presenting this greater likelihood of the presence of children and of consequent damage to their persons, courts have taken into consideration the greater chance of such harm and have treated the circumstances as imposing a duty of greater care than would have been required if the machinery had been located in a secluded spot rarely visited by children.[15]

As in all other negligence problems, the question of foreseeability of harm must always be met, but mere probability of harm seems not to be enough, for we are dealing here with cases in which courts are trying to determine whether there are reasons for holding an owner, occupant, or possessor of property liable for damage done to the person of a trespasser, or at most to a licensee under a very flimsy kind of license. We might as well face the fact that the child visiting unbidden the most attractive of "attractive nuisances" is in no true sense either a business or a social invitee, and that he is ordinarily not even a licensee, except in those cases in

barricade around the pulley so as to have kept children away from it." The court also speaks of the fact that the defendant was a mere licensee in the street.

[13]Znidersich v. Minnesota Utilities Co., (1923) 155 Minn. 293, 193 N. W 449, uninsulated electric wires mounted upon poles having ladders, in a highway adjacent to an unfenced tract used as a playground, Wolczek v. Public Service Co. of Northern Illinois, (1931) 342 Ill. 482, 174 N. E. 577, uninsulated electric wire mounted on pole which plaintiff, an 11-year-old boy, climbed, located in the county forest preserve, which is a playground and recreation area for children and adults.

[14]Ferrell v. Dixie Cotton Mills, (1911) 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N.S.) 64, Hayes v. Southern Power Co., (1913) 95 S. C. 230, 78 S. E. 956, Roman v. City of Leavenworth, (1913) 90 Kan. 379, 133 Pac. 551.

One feature that makes the decision of United Zinc & Chemical Co. v. Britt, (1922) 258 U. S. 268, 42 Sup. Ct. 299, 66 L. Ed. 615, 36 A. L. R. 28, in favor of defendant, unusual is that the dangerous and poisonous pool was on land immediately adjacent to a city of 10,000 inhabitants, with dwelling-houses not far away, and that children other than plaintiff's decedents were present.

[15]See Erickson v. Great Northern Ry. Co., (1900) 84 Minn. 60, 84 N. W 462, 51 L. R. A. 645, 83 Am. St. Rep. 410 in which the fire in question seems to have been near to only a small village, making the chance of such injuries obviously less than would have been the case if the dangerous thing had been in the midst of a thickly populated area. See also Olson v. Ottertail Power Co., (C.C.A. 8th Cir. 1933) 65 F (2d) 893, in which the danger was rendered less by the fact that the uninsulated wire was within a fenced area, though the gate was open, and the wire was apparently to be reached only by climbing up on cement blocks.

which there seems to be good reason to say that there is a license by implication. The inviting or even licensing of his presence by the mere attraction of the "attractive nuisance" is only a fiction. Like any other fiction, if it is carried too far in its effects, it is likely to work unreasonable results. As is true of other fictions, this fiction is founded upon imperfect analogies, for the attractiveness constitutes no real license and the "attractive nuisance" itself bears only a remote resemblance to anything that is regarded by the law as being a nuisance. It is probably always admitted by judges that a person maintaining a dangerous device absolutely essential to the reasonable operation of his lawful business is not liable for every harm to the persons of trespassing children, no matter how great the attraction, if the removal of the danger is impracticable by reason of the prohibitive expense or of unreasonably great mechanical difficulties or of unreasonable interference with the operation of the business.

Usually, in cases in which the defendants have been held liable for injury to a child by an "attractive nuisance," the removal of the danger could have been easily and cheaply accomplished, with no serious interference with the operation of the business of the defendant.[16] Under ordinary conditions, it is not impracticable,

[16]Circumstances seem to indicate that all of this was true in each of the following cases. Williams v. Bolding, (1929) 220 Ala. 328, 124 So. 892 where a child was injured by the explosion of dynamite caps left by road contractors in an open culvert, the caps being apparently easy to remove and place where they would be safe; Mattson v. Minnesota & N. W R. Co., (1905) 85 Minn. 477, 104 N. W 443, 111 Am. St. Rep. 483, 70 L. R. A. 503, 5 Ann. Cas. 498, a similar case of dynamite, which could have been rendered innocuous by removal, the explosive being, however, on defendant's right of way; Powers v. Harlow, (1884) 53 Mich. 507, 19 N. W 257, 51 Am. Rep. 154 another similar case, but different in that plaintiff was a trespasser; Iamurri v. Saginaw City Gas Co., (1907) 148 Mich. 27, 111 N. W 884 where a small boy was injured by the explosion of a drip tank wagon left with vent-hole open, unattended, the explosion apparently being caused by the placing of a match in the vent-hole by his companion, another small boy; Siddall v. Jansen, (1897) 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112 wherein injury to small boy could easily have been prevented by complying with city ordinance requiring catches in elevator shaft to be so placed that doors could be opened only from the inside of shaft; Ft. Wayne & Northern Indiana Traction Co. v. Stark, (1920) 74 Ind. App. 669, 127 N. E. 460 where injury to a boy would have been prevented by the proper insulation of a poorly insulated electric wire running through a tree on private property; Consolidated Electic Light & Power Co. v. Healy, (1902) 65 Kan. 798, 70 Pac. 884 similar case in street; Hayes v. Southern Power Co., (1913) 95 S. C. 230, 78 S. E. 956 where injury to plaintiff's boy would have been prevented by insulation of wire running near window where children were known to play; Znidersich v. Minnesota Utilities Co., (1923) 155 Minn. 293, 193 N. W 449 in which the harm would probably have been prevented either by making the ladder on the electric light pole more difficult of access

difficult, or unreasonably expensive to remove dynamite from a public highway, to take usual precautions to keep elevator shafts

or by posting a "high voltage" warning; McDonald v. Southwestern Gas & Electric Co., (La. App. 1931) 136 So. 169, in which electrocution of plaintiffs' seven-year-old son would have been prevented by a somewhat more effective fencing of defendant's substation, Brown v. Southern California Edison Co., (1932) 120 Cal. App. 102, 7 P (2d) 770, where a posted warning, such as "high voltage," would probably have saved the life of plaintiff's son, twelve years old, Wolczek v. Public Service Co. of Northern Illinois, (1931) 342 Ill. 482, 174 N. E. 577, and McCoy v. Texas Power & Light Co., (Tex. Com. App. 1922), 239 S. W 1105, other cases in which a posted warning would probably have prevented injury to children by electric shock; Ferrell v. Dixie Cotton Mills, (1911) 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N.S.) 64, where the killing of plaintiff's son by a highly charged guy wire, it would seem, could have been prevented very easily by ordinary precautions, Kelley v. Parker-Washington Co., (1904) 107 Mo. App. 490, 81 S. W 631 a case in which merely the removal of a scraper from the street. or even the lesser act of securing its lever, would probably have prevented the harm to plaintiff, a small child, American Ry. Express Co. v. Crabtree, (C.C.A. 6th Cir. 1921) 271 Fed. 287, wherein the laying of a 42-inch iron wheel on defendant's platform flat instead of vertical, would have prevented the death of plaintiff's eight-year-old daughter; Kopplekom v. Colorado Cement-Pipe Co., (1901) 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284 in which the death of plaintiff's young son, it seems, could easily have been prevented by the simple expedient of placing flat on end piping having diameter of 4½ feet, length of only 2 feet, and weight of 500 to 700 pounds; Haynes v. City of Seattle, (1912) 69 Wash. 419, 125 Pac. 147, Kelly v. Southern Wisconsin Ry. Co., (1913) 152 Wis. 328, 140 N. W 60, 44 L. R. A. (N.S.) 487 and Ashbach v. Iowa Telephone Co., (1914) 165 Iowa, 473, 146 N. W 441 cases wherein it would seem that the danger of injury to children could easily have been removed by moderate guarding of defendant's apparatus in the street; Hillerbrand v. May Mercantile Co., (1909) 141 Mo. App. 122, 121 S. W 326 in which, from what few facts are stated in the report, it seems that the danger could have been avoided, both easily and without large expense, by closing more tightly the aperture into which ran the railing of an escalator in defendant's store; Cahill v. E. B. & A. L. Stone Co., (1908) 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N.S.) 1094 in which it would seem that injuries to plaintiff, a twelve-year-old boy, would have been prevented, easily and with moderate expense, by supplying a brake and applying it on defendant's car, heavily loaded with steel rails; Fleming v. City of Chicago, (1931) 260 Ill. App. 496 wherein it seems certain that defendant could easily have removed the danger by taking its abandoned truck chassis away from all public highways, without interfering with the operation of any of defendant's enterprises, Jorgenson v. Crane, (1915) 86 Wash. 273, 150 Pac. 419, L. R. A. 1915F 983, in which injury to a six and one-half-year-old school boy could easily have been avoided by the removal of defendant's 2-wheeled scraper from the school grounds; Gnau v. Ackerman, (1915) 166 Ky. 258, 179 S. W 217 in which plaintiff, a boy between two and three years old, fell into a bed of slaking lime left in the street by defendants, the danger probably being one that could easily have been removed by proper obstructions or by guarding; City of Pekin v. McMahon, (1895) 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206 in which it would seem that the death by drowning of plaintiff's decedent, a boy eight years old, could easily have been prevented, either by filling in the defendant's artificially excavated gravel pit, or by removing the floating planks and logs, which attracted children from the thickly settled city round about; Nashville Lumber Co. v. Busbee, (1911) 100 Ark. 76, 139 S. W 301, 38 L. R. A. (N.S.) 754, one of the few cases in which it directly appears from the evidence that the danger could have

closed, to keep electric wires insulated, to keep an electric station properly fenced, to post warnings of "high voltage," to remove or dismantle dangerous machinery abandoned, to remove from a street a scraper or a truck, to guard dangerous machinery used in or near a street, or to apply brakes to railroad cars or automobiles left on inclines.[17]

In most of the cases in which the defendants have been held not liable for bodily harm to a child by an alleged "attractive nuisance," the removal of the danger could have been accomplished only with difficulty, or with relatively great expense, or even with considerable impairment of the operation of the defendant's business.[18] One important type of case to which courts have rather

been removed without doing any harm to the operation of defendant's business, and at a very low cost ($2.50 to $20.00).

But see Ryan v. Tower, (1901) 128 Mich. 463, 87 N. W 644, 55 L. R. A. 310, 92 Am. St. Rep. 481, in which recovery is denied, although defendant's unused machinery probably could easily have been removed or rendered innocuous.

[17]See note 16.

[18]In Polk v. Laurel Hill Cemetery Ass'n, (1918) 37 Cal. App. 624, 174 Pac. 414, plaintiff's son, eight years old, was drowned in a reservoir maintained in defendant's cemetery. In affirming judgment for defendant, the court said of the rule in the turntable cases. "This rule is, of course, to be understood with the qualification that the dangers of the machinery, although novel and attractive to the immature mind of a child, can be fully or sufficiently guarded against injury without destroying its usefulness for the purpose for which it is maintained."

In Salladay v. Old Dominion, etc. Mining Co., (1909) 12 Ariz. 124, 100 Pac. 441, the court held that defendant's unprotected open irrigation flume was not an attractive nuisance, and that defendant was therefore not liable for the death of plaintiff's daughter, of the age of three years and nine months, who was carried down the flume while trespassing. The court stresses the impracticability of removing such a danger, saying· "Not only flumes, but irrigation ditches, large and small, similar in purpose, construction, and use, and equally dangerous and alluring to the child, are to be found throughout the territory wherever cultivation of the land is carried on, and such conduits, practically impossible to render harmless, are indispensable for the maintenance of life and prosperity."

A standing freight car is held not to be an attractive nuisance, in Smith v. Hines, Director General, (1925) 212 Ky. 30, 278 S. W 142, 45 A. L. R. 980. The opinion says nothing about the difficulty, impracticability, or expense of avoiding dangers to children from standing freight cars; but it is obvious that the obstacles to be overcome in making standing freight cars safe for small children would necessitate such modifications of railroad operations and such huge expenditures as to make the accomplishment of the undertaking impracticable.

In Friedman v. Snare & Triest Co., (1905) 71 N. J. L. 605, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, defendant piled in the street girders required in the improvement of abutting property. Plaintiff, a girl between four and five years old, played on the girders, of which one fell, injuring her. Held, that the attractive nuisance doctrine does not apply. The danger here may have been considerable, but the court was clearly seeking to avoid placing what it regarded as too heavy a burden upon builders placing materials in the street. Probably many would believe that to find for the

consistently refused to apply the attractive nuisance doctrine is

plaintiff here would not have placed an unreasonable burden of care upon such builders. The court makes mention of plaintiff's failure to show that title and legal possession of the owner or occupant of the adjoining land did not extend to the middle of the street, which affects the solution of the question whether plaintiff was a trespasser, as she was not merely traveling along the street when hurt, but was playing on the girders.

As might well have been expected, a pile of railroad ties is held not an attractive nuisance. Carr v. Oregon-Washington R. & N. Co., (1927) 123 Ore. 259, 261 Pac. 899. The impracticability of making such piles safe for children, without a great deal of trouble, very large expenditure, and probably even considerable interference with the ordinary course of railroad maintenance, is evident.

Macon, D. & S. R. Co. v. Jordan, (1925) 34 Ga. App. 350, 129 S. E. 443 is another case of non-liability of the owner of a pile of railroad ties.

In O'Hara v. Laclede Gaslight Co., (1912) 244 Mo. 395, 148 S. W 884, gas pipe, to be used by an independent contractor in laying mains for defendant, remained for three and one-half hours in the position in which it was piled in the street. A child was injured through the loosening of a pipe from the pile by the acts of children. Held, that, even if defendant were not protected by the rule of independent contractor, it could not be held liable, the intervening cause not being one to be anticipated.

But see Charles v. El Paso Electric Ry. Co., (Tex. Com. App. 1923) 254 S. W 1094 holding that a construction company should have contemplated that a pile of cross-ties partly on the sidewalk might attract children to play upon it, and should have exercised ordinary care to stack them in a reasonably safe manner for such use. Is so great an extension of the duty concept reasonable? Perhaps so, where the pile is on a sidewalk. Accord, as to pile of lumber in street, Harper v. Kopp, (1903) 24 Ky. Law Rep. 2342, 73 S. W 1127 and as to pile of abandoned poles on land of which defendant did not have ownership or possession, Burroughs v. Pacific Telephone & Telegraph Co., (1923) 109 Or. 404, 220 Pac. 152 holding that defendant was liable for injury to plaintiff, a six-year-old boy, by the rolling of a pole upon him while he played on the pile. It should be noticed, however, in the Burroughs case, that defendant was itself a trespasser, which, on sound principle, seems to make immaterial the fact that plaintiff was a trespasser, if such is a fact; but the court held that plaintiff was not a trespasser, thus passing upon what would seem to be an unnecessary and irrelevant question. On principle, a defendant trespasser should not be permitted to take advantage of the status of plaintiff as a trespasser, for the disabilities of trespassers in actions against owners or occupants are really for the protection of owners and occupants and not for the protection of trespassers negligently creating or maintaining dangerous conditions on the premises.

In Coon v. Kentucky & I. T. R. Co., (1915) 163 Ky. 223, 173 S. W 325, L. R. A. 1915D 160 defendant maintained over a street a viaduct, with a retaining wall 20 inches wide, which had a smooth surface on top from 28 inches to 15 feet above the street. Plaintiff walked along the top of the wall, fell therefrom, and was injured. Judgment for defendant, on demurrer to petition, was affirmed. The court held that this was not an attractive nuisance. Perhaps the court regarded it as unreasonably burdensome to require of the company the placing of a railing along the top of such retaining wall, especially in relation to the comparatively slight chance that bodily harm would result to any one.

In Manos v. Myers-Miller Furniture Co., (1924) 32 Ga. App. 644, 124 S. E. 357 defendant had a tier of shelves in an alley back of his store. Plaintiff's son, nearly nine years old, climbed upon the shelves, causing them to fall upon his head and kill him. The court affirmed judgment dismissing petition on demurrer, holding that defendant was under no duty to

that of injury to a child by reason of its voluntary contact with

anticipate such a result. Probably the heavy burden on business, of anticipating and guarding against such unusual results, was deemed by the court too heavy in comparison with the slight probability of such consequences.

In Nelson v. Lake Mills Canning Co., (1922) 193 Iowa 1346, 188 N. W 990 plaintiff's intestate, a boy of six, was fatally injured by machinery of defendant, to which he had crawled through an opening under a dump floor. Defendant was held not liable. The danger of such an occurrence would have seemed remote to the reasonable person, and the removal of all dangers so remote might have placed a heavy burden upon the defendant.

In Pennington v. Little Pirate Oil & Gas Co., (1920) 106 Kan. 569, 189 Pac. 137 defendant had pumping machinery, enclosed in an iron house. Plaintiff's son, nine years old, attracted into the place by the fact that the machinery was there, was so injured by being caught in the machinery that he died. Held, that the doctrine of attractive nuisance did not apply. Johnston, C. J., said. "Here the engine and pump was inclosed in a corrugated iron house, and the door into it was provided with a lock, and both house and key were kept in the control of the plaintiff (an employee of defendant) and his wife. It would be difficult to provide a bar or guard which would be practicable and afford greater protection than the house which incloses the machinery. It is true that the door into the building was open, but it was impracticable to keep the only opening into the building closed and locked all the time against trespassers."

In Erickson v. Great Northern Ry. Co., (1900) 82 Minn. 60, 84 N. W 462, 51 L. R. A. 645, 83 Am. St. Rep. 410 plaintiff's intestate, a girl four years old, went upon the right of way of defendant, a railway company, and to a fire thereon, in which she was fatally burned. Judgment for defendant, on ground that complaint did not state a cause of action, was affirmed. The court held that defendant was not guilty of negligence in failing to exercise care to keep children away from the fire. A duty to guard all such fires could well be considered by the court to be too burdensome to impose upon a railroad company, although of course opinions of reasonable persons on this point might differ.

In Szymczak v. Schillinger Bros. Co., (1916) 197 Ill. App. 585, the court refused to extend the doctrine of the turntable cases to the case of a barrel containing hot tar used in making asphalt. The court put the decision on the ground that the barrel of hot tar was not attractive to children. It might also have been said that it would have been difficult to remove the danger, which was, after all, a very slight danger, as there was little chance that any events would occur leading up to bodily harm.

St. Louis & S. F R. Co. v. Williams, (1911) 98 Ark. 72, 135 S. W 804, 33 L. R. A. (N.S.) 94 is a case in which plaintiff's brother, a small boy, going upon defendant's railroad track at a point away from any crossing, picked up a torpedo recently placed there by defendant's servant for the purpose of necessary signalling of trains, and gave the torpedo to plaintiff, an eleven-year-old boy, asking him to "mash it." Plaintiff struck the torpedo, causing it to explode and to destroy the sight of one eye. Judgment for plaintiff was reversed. The court said. "To hold that, under those circumstances, the servants of the company were guilty of negligence, would be to deny the company the right to use torpedoes at all. The undisputed evidence shows that it was necessary for the safety of trains to use them at the time and place named, and no negligence is shown in the method of using them, or that they were left unguarded after the necessity for their use ceased." The court is thus considering the impracticability of the defendant's removing the danger. Obviously, if the railroad company had abandoned the use of torpedoes for giving danger signals, it would have unreasonably increased the danger to its traffic or would have been obliged to substitute a system of signals that might have put upon it an impracticably heavy economic burden under the circumstances of a railroad's operation.

a moving vehicle.[19] It is clear that to require careful guarding of all vehicles from children surreptitiously seeking rides would

In Smalley v. Rio Grande Western Ry. Co., (1908) 34 Utah 423, 98 Pac. 311 plaintiff, a boy five years old, was run against and injured by a car in defendant's railroad yard. Children had each time been ordered to leave the yard, when they had visited it. Judgment for defendant was affirmed. Defendant was held not to have been negligent, as it was under no duty to exercise more care than it here exercised. It is clear that to require the railroad company to do more than was done here to protect children from the dangers of moving cars in defendant's yards would be to require the company to assume a highly burdensome and even impracticable duty.

[19]In Allred v. Pioneer Truck Co., (1918) 179 Cal. 315, 176 Pac. 455, defendant's servant was driving a 3-horse furniture van, loaded, along a public street. Boys, without the knowledge of the driver, rode on the tail gate, which was suspended by chains. Plaintiff's son, nine years old, intending to ride with the other boys, ran and, either in attempting to climb upon the projecting end of the brake-beam or by slipping on the wet asphalt pavement, fell in front of the hind wheel, receiving injuries which caused his death. In affirming a judgment denying recovery, the court said. "It is a matter of common knowledge that boys are prone to steal rides on all sorts of vehicles propelled along the public street, but it would be an intolerable rule that imposed upon the owner of vehicles the duty of employing guards to keep boys so inclined to trespass, at a safe distance therefrom." Accord, Zigman v. Beebe & Runyan Furniture Co., (1915) 97 Neb. 689, 151 N. W 166, L. R. A. 1915D 536 in which plaintiff's intestate, a boy between four and five years old, climbed upon the connecting pole of defendant's two wagons being driven down the street coupled together, and, falling, was run over and killed.

Routt v. Look, (1923) 180 Wis. 1, 191 N. W 557, was a case in which plaintiff, a boy 3½ years old, climbed upon defendant's truck, fell therefrom and was injured. There was no evidence directly showing that defendant's driver knew that plaintiff was on his truck. Plaintiff had verdict and judgment. In reversing and remanding the cause, the court said. "The driver is not required to assume that a child of such years will climb upon the truck, nor is he bound to stop his truck where he passes a group of children and inspect the truck to see whether or not a child has attempted to climb upon the truck."

In Walsh v. Haues, (1899) 72 Conn. 397, 44 Atl. 725, plaintiff, a five-year-old boy, climbed upon the end of defendant's ice-wagon, while it was in motion. The wagon struck a depression in the street, which caused a block of ice to knock plaintiff to the surface of the street and to fall upon his leg, injuring him. The court affirmed a judgment for nominal damages, saying: "The boy who was injured was warned of his danger by one of the defendant's servants as soon as his presence was observed. Only extraordinary precautions, such as the use of a tail-board extraordinarily high, could have prevented any chance of such an accident. No such standard of care could be required on the part of the defendant." Probably the danger that this type of injury would occur was only moderate, and probably the requirement that the rear of the wagon be effectively closed against infant trespassers would be highly burdensome.

In Rasimas v. Chicago Rys. Co., (1921) 223 Ill. App. 289, the court held that an empty street car with both vestibules closed while being switched into car barns was not an attractive nuisance so as to require the company to keep another employee on or near the car to warn boys from trespassing thereon. It is clear that to make such a requirement would have placed an unreasonable burden upon the company, and that the degree

be to place an unbearable burden upon every person operating a vehicle in city streets or causing a vehicle to be there operated by his servant. Probably vast and difficult structural changes in defendant's plant would never be required in order to avoid the remote danger of some unusual type of occurrence resulting in bodily harm to a child,[20] if indeed such changes could ever be required in order to avoid a fairly obvious danger of a usual type of occurrence likely to result in such bodily harm.

The disposition of some of the cases diverges more or less from the two general types already discussed, namely, those cases in which it is indicated, tacitly but none the less clearly, that it is the duty of the defendant to remove an obvious and serious danger that is easily removed, and those other cases in which it is indicated just as certainly that the court will not say that the defendant was under a legal duty to remove the danger, if such removal would necessitate acts on his part that are impracticable

of danger was not very great.

A different type of case is Hight v. American Bakery Co., (1912) 168 Mo. App. 431, 151 S. W. 776 in which defendant sent its wagon through a city street, with the horses at a walk, distributing advertising aeroplane toys. Plaintiff, a ten-year-old boy, with other children, followed the wagon, trying to procure the toys when they fell, after their power was spent. One toy falling under the wagon, plaintiff reached between the wheels for it and fell in front of the rear wheel, which passed over his arm, injuring him. Judgment for plaintiff was reversed. The reasoning of the court that the attractiveness of the toy was only a remote cause, and the apparent treatment of the plaintiff's placing his arm between the front and rear wheels as the one legal cause, is of course not any attack at all on the problem whether the damage should have been anticipated and guarded against by defendant. Unlike other cases of injury to children by vehicles in the street, this is a case in which defendant intentionally attracted children to its wagon.

[20]Defendant constructed a conduit 700 feet long, covering a shallow stream. At a considerable distance from the ends, which were left open, defendant at times discharged waste steam and hot water from the boilers of its power plant. Plaintiff's decedent, a twelve-year-old boy, with others, tried to walk through the conduit, and was killed by a discharge of steam. In affirming judgment for defendant, the court stressed the fact that the danger was not great, saying: "The danger here consisted of the hot water and steam. This danger was of occasional occurrence only, being every day or two, as pleaded in the petition, with no definite showing as to its frequency in evidence, except such as may be inferred from the circumstance that it seems to have been the waste steam and hot water from the power house. The radius of the danger was obviously limited in area and its duration temporary. It was limited to a place in the conduit several hundred feet from either opening and far from the opening through which this boy entered." Hardy v. Missouri Pac. R. Co., (C.C.A. 4th Cir. 1921), 266 Fed. 287. Clearly, to require a company to close tightly the ends of this conduit, through which a stream flowed, would have presented serious difficulties. Perhaps to require posted notices of danger would have been reasonable and not burdensome.

in the regular pursuit of his business, either because of very great physical difficulties or because of excessive expense. The cases diverging in their disposition from these types are of two kinds first, cases in which the court says that defendant was under a duty to remove the danger, though, from the facts stated, it seems that the removal of the danger would probably have presented unreasonably great difficulties;[21] and second, cases in which, although the removal of the danger would probably have been easy, the defendant was not held liable.[22]

To require the removal of a great danger only in those cases in which such removal can be accomplished "with slight expense and little inconvenience"[23] would seem somewhat extreme, for great dangers may render necessary great care, involving more than slight expense and little inconvenience. Although the child is a mere licensee and even that merely by reason of the slender thread of a somewhat vague implication, the probability of death or serious bodily harm by reason of the occupant's dangerous

[21]Perhaps such a case is Berg v. B. B. Fuel Co., (1913) 122 Minn. 323, 142 N. W 321, in which defendant maintained an unprotected bark machine, consisting of an endless chain running in a slanting trough, and used for removing bark from a river, where, within a city, children often bathed, fished, and gathered wood. When the machine was in operation, plaintiff's son, about ten and one-half years old, while sitting on the cross-timber which held the trough, took hold of a piece of wood, which was moving in the trough, and so lifted it that his thumb was caught, to his injury. Judgment for plaintiff was affirmed. The court emphasizes the attractiveness of this machinery to children. How difficult or expensive the removal of the danger would have been, we cannot feel very sure from the report; but very probably it would have been a matter of considerable difficulty and expense to remove the danger by covering the trough containing the chain, when one considers that the chain was carrying large pieces of wood and that the trough was 12 to 18 inches wide and some 5 inches deep, and 100 feet long. Probably the complete covering of such a trough would have been not only expensive but also difficult of achievement without serious interference with the functions of the trough and chain. It would seem that this case goes directly counter to the usual tendency to refuse to apply the attractive nuisance doctrine to cases wherein the removal of the danger would have been unreasonably difficult or expensive.

[22]Defendant, a paving company, maintained an asphalt boiler, with a faucet, and at some distance a sand pile. Children were attracted to the sand pile. One of the children, plaintiff, who was about seven years old, was severely burned by the falling out of the faucet of the asphalt boiler. Held, that the maintenance of the faucet was not the proximate cause of plaintiff's injury, and that defendant's duty to servants did not imply a duty to trespassers or licensees. Sexton v. Noll Construction Co., (1918) 108 S. C. 516, 95 S. E. 129. It seems certain that the maintenance of the faucet in a tight and safe condition would not have been at all difficult: but the court apparently wished not to recognize a duty toward trespassing children to keep the faucet safe.

[23]Brown v. Chesapeake & O. Ry. Co., (1909) 135 Ky. 798, 123 S. W 298, 25 L. R. A. (N.S.) 717

things may be such as to make a considerable degree of exertion necessary as the act of a reasonable man to avert a very likely disaster.

On the other hand, to say that the occupant must insure the safety of the child, or that he must desist from the pursuit of a legal and useful occupation, or that he must make such structural changes in his property as to render the continuance of such business impossible, would be to attain an unreasonable result. To require the destruction of a rightful and useful business in the interest of the safety of juvenile trespassers or licensees by mere fiction would be, in some cases, only to destroy the livelihood of the occupant and his employees, in an endeavor to remove a danger very slight.

The rule stated in the American Law Institute's Restatement of the Law of Torts,[24] limiting the liability of the possessor of land for bodily harm to young children trespassing thereon by a structure or other artificial condition to cases in which "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein," is most directly and expressly supported by the California cases,[25] by one Nebraska case,[26] and by one Kentucky case;[27] but it is believed that the many cases herein examined indicate that, nearly always, even in those instances in which the court is entirely silent on this phase, the greater the danger in proportion to the difficulty of achieving safety, the more chance there is that the plaintiff will recover.

[24]Sec. 209, pp. 152, 153, especially subsection (d)

"Sec. 209. Liability for artificial conditions highly dangerous to trespassing children.

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily injury to, such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

[25]See note 3, supra.

[26]Chicago, B. & Q. R. Co. v. Krayenbuhl, (1902) 65 Neb. 889, 91 N. W 880, 59 L. R. A. 920, a turntable case.

[27]Brown v. Chesapeake & O. Ry. Co., (1909) 135 Kv. 798, 123 S. W 298, 25 L. R. A. (N.S.) 717

When a case once meets the first three conditions outlined in the Restatement,[28] whether the court expressly says so or not, if there is a peril very great, of which the removal is easy, recovery will probably be allowed;[29] and, if there is a peril not very great, of which the removal is difficult, recovery probably will not be allowed. Between these extremes lie cases presenting various gradations of results of comparisons of risks with burdens of removal of risks, with consequent variations in the probability that plaintiff will recover.[30]

[28]Restatement of the Law of Torts, Tentative Draft No. 4, Sec. 209, subsections (a), (b), and (c). See footnote 24.

[29]A recent case, probably influenced in its disposition by these considerations, is Drew v. Lett, (Ind. App. 1932) 182 N. E. 547, in which defendant left his abandoned coal mine open and unguarded. Plaintiff's eleven-year-old son, having entered the mine to play, was asphyxiated by poison gas. Judgment for defendant was reversed, with instructions. The application of the attractive nuisance doctrine to this case was to be expected. The utility of this dangerous condition, in an economic sense, would seem to be nil, and the danger was very great. The danger apparently could have been removed very easily, by closing the entrance.

[30]In arriving at "the utility to the possessor of maintaining the condition," probably there should be considered. first, the economic usefulness of the dangerous article, second, the cost of removal of the danger; third, the physical difficulties to be encountered in removing the danger; and fourth, the degree of interference of such removal with defendant's business.